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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLER

No. 70-130

UNITED STATES OF AMERICA,
Petitioner,

v.

SCOTLAND NECK CITY BOARD OF EDUCATION, ET AL.

No. 70-187

PATTIE BLACK COTTON, ET AL.,
Petitioner,

v.

SCOTLAND NECK CITY BOARD OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

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BRIEF FOR RESPONDENTS

We accept the Petitioners' statement of Opinions below, Jurisdiction and Constitutional and Statutory provisions involved.

QUESTION PRESENTED

We do not accept the statement of the issue in the brief of either petitioner. Each assumes a conclusion that the Scotland Neck plan of December 1969 would impair required desegregation. That is a question which is in issue here.

Our Statement of Question Presented is this:

Does the North Carolina statute, which the District Court and the Court of Appeals found to be an honest effort to achieve quality education, meet the requirements of this Court as a realistic "Interim Corrective Measure" to dismantle the remaining vestige of law imposed segregation in the Scotland Neck Area?

STATEMENT

A. THREE DETERMINATIVE FACTS

We find it necessary to make a statement of what we think are determinative facts.

At the threshold of such statement we call special attention to three key facts, the first of which was the subject of a mere casual reference and the second and third of which were not mentioned at all in the Statements of the petitioners. Those three key facts are:

1. The full intent and plan of operations of the Scotland Neck City Board of Education is set forth in its First Further Answer and in its published advertisement soliciting contributions to finance the defense of this lawsuit. Those papers are so important that we have put them in an Appendix to this brief. (App. A and B.).

2. The Court of Appeals found "there is nothing in the record to suggest that the greater percentage of white students in Scotland Neck is a product of residential segregation resulting in part from state action." *U.S. v. Scotland Neck City Board of Education* 442 F. 2d 575 at page 582. (App. 1115). Neither brief for the petitioners mentioned that quotation.

3. The record shows that, in the 26 months following the temporary injunction of the District Court of Au-

gust 26, 1969, 46.7% of the white students left the public schools of the Halifax County District; thereby increasing the black ratio in the district from 77.7% to 85.8%. (See Table I, App. E). Because of the importance of this fact we have placed in an appendix to this brief a copy of three affidavits of W. Henry Overman dated September 15, 1970, December 2, 1970, and October 14, 1971 (App. D).

They show school attendance in the Halifax County District by race for the school year 1970-71 and for October 1971. Again neither brief for the petitioners mentions this significant experience.

The original injunction was sought and the reversal of the Court of Appeals is now sought on the theory that by making the Black-White ratio in Scotland Neck nearly even there would be left available less white Scotland Neck students for distribution among the other schools of the district; namely that the district ratio would become 80% under the Scotland Neck plan, an increase less than 3 percentage points in the Black ratio in that remaining portion of the district.

As said above, the Halifax County district *ratio* in the twenty-six month period following the injunction was *increased* from 77.7% Black in 1968-69 to 85.8% in 1971-72. (See Table I, App. E).

The District Court erred in not making a realistic appraisal of the prospective student flight.

We submit that the impact of those three facts is strong.

Hereafter in the argument portion of this brief, (infra. p. 20), we shall point out that the law heretofore declared by the Supreme Court supports rather than invalidates the North Carolina Statute.

In the following statement it will be necessary to repeat some of the facts in Statements for the Petitioners in order that the facts which we think are so important may be under-

stood in their proper context. We will attempt to hold repetition to a minimum.

B. THE BACKGROUND

We have adopted the statement of facts in the District Court opinion 314 F. Supp. 65 at 67 (E.D. N.C. 1970), (App. 1062) and in the majority opinion in the Court of Appeals 442 F. 2d 575 (4th Cir. 1971) (App. 1104). We will call attention to some additional facts and will present them argumentatively.

The District Court found: "Scotland Neck, a small town with a population of approximately 3,000, is located in the southeastern corner of Halifax County, a rural and agricultural region of North Carolina which has a predominantly black population. The population of the town itself is approximately 50% white and 50% black." 314 F. Supp. 65 at 67. (App. 1063).

The people, black and white in the area have cooperated closely and have enjoyed and are enjoying excellent racial relations. (App. 436).

The residential patterns of Scotland Neck and of the surrounding territory have not been caused by State action. The Court has so found. The majority of the Court of Appeals said in its opinion "There is nothing in the record to suggest that the greater percentage of white students in Scotland Neck is a product of residential segregation resulting in part from State action." 442 F. 2d 575 at 582. (App. 1015.)

With its economic and geographic attributes it appears certain that Scotland Neck must achieve and must maintain two objectives, one, good schools, and two, good racial relations.

That background lends meaning to all that was done by the people of Scotland Neck as recorded in this case, by the

Legislature of North Carolina and by the Scotland Neck City Board of Education.

C. CHAPTER 31, 1969 SESSION LAWS OF NORTH CAROLINA

The Majority Opinion in the Court of Appeals describes carefully and accurately the struggle of the people in Scotland Neck to get a better school and their frustration at the hands of the County School Board and of the Legislature. Those efforts antedated the decisions of this Court in *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), *Rainey v. Board of Education*, 391 U.S. 443 (1968) and *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968). The Majority Opinion says "Local control and increased taxation were thought necessary to increase the quality of education in their schools. Previous efforts to upgrade Scotland Neck schools had been frustrated." 442 F. 2d 575 at 580. (App. 1104).

Early in the 1969 Session of the North Carolina Legislature the legislative act here in question was enacted (March 3, 1969, Chapter 31, 1969 Session Laws). That statute was not a part of a package. It stood alone. It antedated the Warrenton School Bill enactment (May 23, 1969, Chapter 579, Session Laws of 1969) and the Littleton-Lake Gaston Laws (May 26, 1969, Chapter 628, Session Laws of 1969). Both the Scotland Neck proponents and the Legislative enactors of the bill must have been familiar with the *Green* case and its companion decisions. They must have concluded that the Scotland Neck bill met the requirements of those decisions.

They knew that the Supreme Court of the United States in a unanimous opinion in the *Green* case had said "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case . . . Moreover, whatever plan is adopted will require evaluation in practice, and the Court should retain jurisdiction until it is clear that state imposed segregation has been completely removed." 391 U.S. 430 at 440-41 (1968).

Further they knew that the *Green* case said "Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable," 391 U.S. 430 at 442, and "The Board must be required to formulate a new plan, and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools." 391 U.S. 430 at 442.

The proponents and the legislative enactors also knew that as a footnote to the quotation last given above the Court had said "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, nonracial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School." 391 U.S. 430 at 442, N. 6.

The proponents and the enactors knew that an authoritative spokeswoman for the Federal Department of Health, Education and Welfare had made public announcement, which was in the press and was put into this record, that the Department had no interest in the Halifax County bill if it treated Blacks and Whites alike. (App. 776.)

Further the proponents and the legislators knew (and acted on that knowledge) that the thrust of the Halifax County bill, its scope and its certain effect, was to set up a

school district with about a 57% white pupil residence and 43% black pupil residence. They knew that they were to be treated precisely alike, that there would be no discrimination. They knew that the structure of state-imposed segregation within the borders of Scotland Neck would be totally and completely demolished.

The Legislators also knew that the *operation* under the Halifax County Bill and all matters of administration such as the making of transfers in and out of the Scotland Neck School would be under the certain and careful supervision of the Federal District Court for the Eastern District of North Carolina. They knew that no child could be transferred from the Scotland Neck School to a Halifax District School against the wishes or requirements of the Court.

So, the Legislators stopped at the establishment of the district. Thereafter, transfers and other administrative matters were problems between the Scotland Neck City Board of Education and the Halifax District Board of Education and the District Court for the Eastern District of North Carolina.

The intent of the Legislature was plain. It was the enactment of the bill, which speaks for itself. That bill accomplished the purpose of the Legislature completely. In a later section (infra p. 13) we will discuss "Motivation", including a desire to deter the withdrawal of students from the public school system.

D. THE VOTE

Following the passage of the statute there was held a vote of the people. They approved and accepted the terms and conditions of the bill and authorized a special school tax of 50c on the $100 of property valuation within the boundaries of Scotland Neck.

There are three things which we underscore about that vote which occurred on April 8, 1969:

1. More people voted than had ever voted before in a Scotland Neck election (Deposition of Henry L. Harrison, p. 16).

2. The affirmative majority was very unusual — 71%. (App. 1062).

3. It is a matter of general knowledge that any approval of a special school tax in North Carolina is very rare these days.

After the resounding approval by the voters the Scotland Neck City Board of Education proceeded to prepare for the opening of its school.

E. THE PRELIMINARY INJUNCTION

On June 16, 1969, complaint was filed in the District Court of the United States by the United States Department of Justice against the Halifax County Board of Education.

That complaint sought relief on three grounds stated essentially as follows:

> 12. The enactment and implementation of Chapter 31 commands, encourages and fosters segregation based on race or color in the operation of the public schools of Halifax County.
>
> 13. Chapter 31 sets up a separate school system which, on grounds of its size and pupil enrollment, has no educational justification.
>
> 14. The enactment and implementation of Chapter 31 . . . denies equal protection of the laws to Negro children of school age residing in the jurisdiction of the Halifax County Board, outside the boundaries of Scotland Neck, in violation of the Fourteenth Amendment to the United States Constitution. (App. 29).

On July 17, 1969, petitioner for the first time filed motion for preliminary injunction. (App. 39). The Scotland Neck

City Board of Education (hereinafter called the School Board) was not made a party at the time of the filing of the Complaint. On August 16, 1969, the School Board and its members were notified that they had been made parties and that a preliminary answer must be filed by August 20, (App. 60), and that a hearing on a motion for a preliminary injunction would be held in Raleigh, North Carolina on August 21. (App. 60). On August 21 those defendants found that they faced a two Judge District Court, composed of Chief District Judge Algernon L. Butler and District Judge John D. Larkins (in whose division Scotland Neck lies). After hearings on August 21, 22 and 23 the two Judge Court, on August 25, entered a preliminary injunction against the School Board, stopping all of its activities. (App. 788-89).

The August 25th Order establishing the Preliminary Injunction made it clear that the District Court was not declaring the statute unconstitutional. Rather it condemned the effect of the operation of the transfer provision. The District Court said in its memorandum opinion pursuant to the order, "without determining the constitutionality of Chapter 31 of the 1969 Session Laws of North Carolina, the act in its application creates a refuge for white students and promotes segregated schools in Halifax County." (App. 792).

F. THE FIRST FURTHER ANSWER

On September 3, 1969, the City Board of Education, with permission by the Court filed an Amended Answer, supplanting the answer which it had hurriedly prepared and filed on four days requirement by the District Court. We submit that the allegations of that Answer and the filing of that Answer are so important in determining the issues in this appeal that we included in an appendix to our brief, for ready reference, an EXCERPT FROM that First Further Answer (App. A). We call to the special attention of this Court paragraph 8 and the prayers of that Answer which read as follows:

8. It is the present intention of this Defendant, and this Defendant makes this continuing representation, that, if and when there is removed the temporary injunction barrier preventing operation under the Statute, Defendant will confine its student body to those students residing within the geographical limits of the Town of Scotland Neck, plus or minus such student transfers as may be in conformity to the law and/or Court order or orders applicable to Defendant, and in conformity to a plan of limitation of transfers to be prepared by Defendant and submitted to this Court.

WHEREFORE, this Defendant respectfully prays that:

1. The Court declare to be constitutional Chapter 31 of the 1969 Session Laws of North Carolina;

2. The Court dissolve the temporary injunction heretofore issued in this cause on the 25th day of August, 1969;

3. The Court retain jurisdiction of this cause for the receipt of a plan of transfer to be submitted by the Defendant to the Court and for the hearing of any objection that may be filed thereto.

We submit that, by such filing and such commitment by the Defendant Board, it severed the question of the possibility of contaminating performance from the question of the constitutionality of the statute. Thereafter transfer performance was not to be made by the Board first and subject to attack if opponents desired, but, rather, was to be made only after approval by the Court of what was to be done. That is a unique and distinctive feature in this case.

Furthermore, we submit that by that action the City Board fortified its contention with respect to the intent of the proponents of the statute, namely that the improvement

of the quality of education was the central dominant motivating factor of the proponents of the bill. The Board, in essence, was saying plainly and convincingly that we will take as the basis of a new and better school the residents within the borders of Scotland Neck together with special tax money and local control; these will be our prime working tools for school betterment; beyond those basic essentials we will proceed only in such manner as shall receive the prior approval of the Court.

We submit that, when this matter was presented to the District Court for determination on its merits in December 1969, there was presented only the question of the constitutionality of the statute.

G. THE ADVERTISEMENT FOR CONTRIBUTIONS

The Temporary Injunction had tied the hands of the City Board in every respect, including the denial of the use of any of the tax money to defend this suit. Defense had to be financed, if at all, by public contributions. On October 10, 1969, the Scotland Neck City Board caused to be printed in the newspaper published in that community, *The Scotland Neck Commonwealth*, an advertisement soliciting contributions in aid of defense of the pending suit. That advertisement was signed by the Chairman and each other member of the Board. It was evidence of the publicly proclaimed intent of the Board. It was offered and received in evidence in the District Court. (App. 964). We think that the contents of that advertisement are so important with respect to motive, intent and future operations that they are worthy of special attention. We have included a copy of that advertisement in Appendix B to this Brief. We here call the Court's special attention to the language as follows:

1. The special act sets up a special school district with lines which are just the same as those of the long existing city limits. There is no change in the lines.

2. The district embraces all children of school age living in our Scotland Neck Community. It is contemplated by the Statute, it is required by law, it is the intent of this Board that every child living in this community shall be treated just the same, regardless of race, creed or color. There will be no segregation under our operation.

3. The basic school population of our community, would be approximately 57% white and 43% negro. We do not know of any complaint which has ever been made anywhere of such a ratio.

4. Transfers out of or into the Scotland Neck Schools would be made in accordance with a plan or plans of transfer to be prepared by our board and filed with the Court, in order that any objections to such plans could be made to the Court and heard by it.

5. Every operation of our Board would be in the plainest kind of a spotlight, in the spotlight of public opinion and the spotlight of Court observation.

6. It is the firm intent of our Board, and the firm intent of the people of Scotland Neck to make our new School District Work, to make ours an outstanding school, not a "segregated school," not an "integrated school," but just a school "for all of our children without regard to race, creed or color."

7. It is our firm conviction that the successful operation of "just a school" would be good for our community of Scotland Neck, good for our County of Halifax, good for our State and good for our Nation. The welfare of Scotland Neck, and possibly its survival, depend upon the success of just such a school." (App. B.)

H. THE HEARING ON THE MERITS AND THE DECISION OF THE DISTRICT COURT

Approximately three months after the filing of the First Further Answer and approximately two months after the advertisement soliciting defense funds, the matter was heard on the merits in the District Court on December 17-18, 1969. At that hearing there were presented exhibits, depositions and witnesses as appear in the record. We call special attention to one phase of that record. It shows that the defendant City Board of Education presented as a witness and examined Chairman Shields of the Scotland Neck City Board of Education. His testimony is set forth in App. 961-965 and is reproduced as Appendix C to this brief: Mr. Shields covered the subjects of the statements made by his board in its First Further Answer and in the Advertisement for Contributions. He testified as to the quality of the community support. At the conclusion of his testimony he was tendered for cross examination. Counsel for plaintiffs said "No questions, your honor." (App. 965). Immediately after the testimony of Mr. Shields the other four members of the Scotland Neck City Board of Education were sworn and presented as witnesses. They were requested to raise their hands if they agreed with the testimony given by Mr. Shields. The record (App. 966) (reproduced here as Appendix C to this brief) shows that "each member of the board held up his hand." That page of the record shows that those four witnesses were tendered for examination by the Court and for cross examination. The record shows that counsel for plaintiffs stated "No questions." It further shows on that same page that no question was asked by either member of the Court.

In addition to that most convincing acknowledgment of the sincerity of the members of the Board and of the truth of their expressions, we call attention to the next impressive fact; that at the hearing on December 17-18, 1969, the plaintiffs did not produce one witness who questioned the

honesty of those Board members or the truth of anything that they had said in either of those important documents or on the stand at the hearing.

We call attention to the fact that at no time did plaintiffs produce even one witness who was a resident of Scotland Neck and who questioned the sincerity of the objective to achieve a better school or who complained about either the enactment of the statute or any contemplated operation under it.

The District Court excepted, from its consideration of the constitutionality of the Statute, the performance matters which occurred prior to the filing of the First Further Answer. It did find that the Statute ". . . interferes with the desegregation of the Halifax County School System, in accord with the plan adopted by said board to be implemented on or before June 1, 1970," 314 F. Supp. at 78. (App. 1083). Necessarily, operation under the Statute would require a change of the plan made for a district which embraced Scotland Neck. The District Court made no effort to compare the quality of the "interim corrective measure" presented by the plan which had theretofore been adopted for the whole district and the desegregation which would occur under the Statute.

The District Court made very plain what was the sole basis for its decision. It said:

> Therefore, this Court's findings of fact that the legislative bill creating the district *was at least partially motivated by a desire to stem the flight of white students from the public schools, the Court must* find that the act is unconstitutional and in violation of the Equal Protection Clause of the 14th Amendment and *must* enter permanent injunctive relief for the plaintiff. 314 F. Supp. at 78. (Emphasis added.) (App. 1084).

I. THE HEARINGS AND THE DECISION IN THE COURT OF APPEALS

In due course the appeal from the District Court was heard on September 16, 1970, by a panel of the Court of Appeals consisting of Judges Boreman, Bryan and Craven. Subsequently by order of the Court there was an oral argument on December 7, 1970, before the full Court sitting *en banc*.

On March 23, there was a decision by the majority of the Court, 442 F. 2d 475 (4th Cir. 1971) (App. 1104). The opinion was by Judge Craven. Dissents were filed by Judges Sobeloff and Winter. 442 F. 2d at 588. (App. 1126).

We think it would serve no useful purpose to repeat in any detail the points of the opinions. The differences of opinion between the majority and the dissenters were made clear.

The majority speak of desegregation.

The dissenters speak of integration.

The majority speak of flexibility in handling the problems of dismantling.

The dissenters speak of rigidity of treatment and of fixed ratios.

The majority speak of danger of flight of students to private schools.

The dissenters do not speak at all about the danger of flight of students to private schools.

The opinions of the majority are more persuasive and more realistic than are the dissents. The majority looked toward peace and cooperation, progress and better education.

J. THE DECLINE IN SCHOOL ENROLLMENT FOLLOWING THE INJUNCTION

The enrollment figures for the Halifax County School District for the school year 1968-69 were Black 8196 (77.7%) and White 2357 (22.3%). (Overman deposition—App. 219) (Table I, App. E).

The enrollment figures for the Halifax County District for the school year 1970-71 and for the school year 1971-72 were furnished by affidavits of Superintendent Overman. They are three in number dated September 15, 1970, (App. 1100), December 2, 1970, (App. 1102), October 14, 1971, (App. 1153). The first two were put into the record before the Court of Appeals without objection. The third was added to the record of the Court of Appeals by consent and Stipulation of Counsel. (as appears in footnote App. 1153). The admission and consideration of these three affidavits appears to be in accord with the language and action of the Court in *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33 (1971) at page 37 where the Court said: "These figures are derived from a report of the school board to the District Court; they were brought to our attention in a supplemental brief for petitioners filed on October 10, 1970, and have not been challenged by respondents." Thereafter the Court said, page 37, "The measure of any desegregation plan is its effectiveness."

Because of the significance of these three affidavits in our presentation of our case we have attached them to this brief as Appendix D.

The enrollment figures for that same district on September 15, 1970, were Black 7716 (84.3%) and White 1446 (15.7%). (Overman affidavit—App. 100). The enrollment figures for the same district on October 14, 1971, were Black 7585 (85.8%) and White 1255 (14.2%). (Overman affidavit App. 1153) (Added to record by stipulation of the parties). In the 26 months from the signing of the injunc-

tion to October, 1971, 1102 white pupils (46.7%) and 611 black pupils (7.5%) had disappeared from the district schools (computation from Table I, App. E).

INTRODUCTION AND SUMMARY OF ARGUMENT

The law decisive of the issue here is declared in the *Brown* cases, the *Green* case, and the *Swann* case. The *Brown* cases (1954, 1955) struck down all laws requiring segregation in the public schools.

The *Green* case (1968) required that there be dismantled every identified remaining vestige of law imposed segregation. It spoke of the uprooting of the causes for the failure of freedom of choice to work. It warned of the variety of conditions to be met and of their complexity. It ordered flexibility of treatment and the exercise of discretion and realism.

The *Swann* case (1971) reflected experience under the *Green* case. It declared that the jurisdiction of the Court in this vestige uprooting process was equitable in nature; that jurisdiction in a specific case must be based on the identification of the vestige; that any Court-directed pupil assignment, made on the basis of race is " . . . an interim corrective measure." It was made plain that such interim corrective measure was to be directed to the uprooting or removal of the causes of such remaining vestige.

The only identification, in this case, of a remaining vestige of law imposed segregation was that nearly all of the black pupils resident in the Scotland Neck City limits had failed to exercise a choice to go to the Scotland Neck school and that many white pupils residing in rural areas outside of Scotland Neck had chosen to attend the Scotland Neck school.

Admittedly some "interim corrective measure" was indicated if the requirements of this Court were to be met.

Any such measure must be fashioned in a manner to tend to correct the causes of failure of the pupils of each race to exercise normal and race-oblivious choice of schools.

Before fashioning any such corrective measure there must be a careful search for those causes.

Here is the heart of this case.

Obviously the most proximate cause of the failure of pupils resident in the Scotland Neck area to exercise freedom of choice was the reluctance of those pupils, of each race, to attend a school in which the pupils of another race are heavily predominant in numbers.

So, a search must be made for the causes of such reluctance.

The readily apparent cause is the feeling or fear that a small minority group of students, black or white, would face isolation, hostility, danger of physical injury, and an education not fashioned properly for that small minority group.

Any realistic interim corrective measure must be directed toward removing or abating those fears on the part of the people of each race.

The Scotland Neck Plan would have the following favorable forces working for it:

1. The school attendance zone follows a natural residential patern.

2. The students resident in that district are very nearly evenly divided racially.

3. There would be special tax money for the making of a better school.

4. There would be strong neighborhood support for the well balanced school.

5. The balanced condition of the races would tend to deter flight from the public schools of the district by both whites and blacks.

6. The Scotland Neck school has the realistic aspect of working now and of being permanent.

7. A successful school in Scotland Neck could become an observed success and tend to abate racial distrust through the local area, through the Halifax District and beyond.

On the other hand, the Court enforced plan which it put into effect would have marked disadvantages in each of those seven fields.

1. It does not follow a natural residential patern.

2. It does not achieve one school in which there would be a nearly even white-black ratio.

3. There would not be generated any additional money for the improvement of any school.

4. It weakens rather than strengthens the neighborhood support.

5. It would tend to increase both white and black flight from the schools.

6. It does not reflect a realistic approach and does not have any aspect of permanence.

7. It could not succeed and its failure would increase racial distrust in the whole district rather than abate it.

The experience of the Court-adopted plan proves the defects which we have listed above. In the 26 months following the August 26, 1969, injunction issued by the District Court 46.7% of the white pupils and 7% of the black pupils disappeared from the Halifax County School District. (Computation made from the figures taken from Table I, App. E).

ARGUMENT

I.

FOUR LEADING CASES ON DISMANTLING CONTROL DISPOSITION OF THIS CASE AND THOSE CASES SUPPORT THE MAJORITY OPINION OF THE FOURTH CIRCUIT

This case is unique on its facts. We know of no other similar case which has been decided by this Court.

It is our contention that the issues in this case are controlled by what this Court has said in the four leading cases on dismantling and that those cases indicate an affirmation of the opinion of the Court below. Those cases are:

Brown v. Board of Education, 347 U.S. 483 (1954) *(Brown I)*

Brown v. Board of Education, 349 U.S. 298 (1955) *(Brown II)*

Green v. School Board of New Kent County, 391 U.S. 430 (1968)

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (April 20, 1971)

A. THE *BROWN* CASES

The *Brown* cases struck down the bar of all state-imposed racial discrimination, discussing at length the problem of desegregation of the public schools. Much was said about the complexity of the desegregation problem, the equitable nature of the remedy and the need of flexibility in the application of the equitable remedy. It was made clear that there was no rigid formula for desegregation and that discretion should be left to the decision of the administrative

bodies and the lower courts. The *Brown* cases made it clear that the Court had jurisdiction to desegregate but that it had no jurisdiction to integrate, to mix the races for the sole purpose of achieving some desired balance. The Court was very careful in those two decisions to confine its opinion and mandate to desegregation. It spoke only of desegregation.

B. THE *GREEN* CASE

Green v. School Board of New Kent County, 391 U.S. 430 (1968), marked the pronouncement of a new and difficult concept. The Court said that Freedom of Choice had failed to accomplish the desired desegregation in many instances. The Court held that it was not sufficient to destroy the laws requiring or supporting segregation. It held that the Court had the duty and that it had the equitable power to require that discriminatory conditions caused by law imposed segregation be undone.

Again the Court made it very plain that the jurisdiction of the Court was founded on illegal segregation, and that its action was limited to requiring the correction of conditions resulting from illegal segregation. The Court described specifically its field of action as the undoing of the remaining vestiges of condemned segregation.

Again the Court emphasized the variety of possible remedies, the necessity of flexibility, the discretion to be left to local administrative authorities and to the lower courts. It even spoke of trial and error methods. It strongly commanded realism in judgment and the search for a plan "that promises realistically to work, and promises realistically to work *now*." 391 U.S. at 439.

The Court said at page 439:

> The obligation of the District Court, as it always has been, is to examine the effectiveness of a proposed plan

> in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case . . . Moreover, whatever plan is adopted will require evaluation in practice, and the Court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

In footnote 6 at page 442 the Court pointed out that the Kent County problem could be solved by geographic zoning. In that respect the facts of *Green* are similar to the facts in the *Scotland Neck* case.

The Court in *Green,* as in *Brown I* and *Brown II,* was careful to speak of desegregation rather than of integration.

C. THE *SWANN* CASE

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (April 20, 1971) applied, with elaboration, the pronouncements of the *Brown* cases and of the *Green* case. It applied those principles to reasonable busing of students to achieve the dismantling of a law imposed segregated structure. Again the Court spoke carefully of desegregation and avoided the term integration. It adhered to and emphasized the pronouncement that jurisdiction was founded on the need for dismantling a remaining vestige of law imposed segregation.

With respect to flexibility of a remedy the opinion in the *Swann* case quoted from *Brown I* as follows:

> In fashioning and effectuating the decrees, the Courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs, 402 U.S. 1 at 12.

On page 15 the Court said " . . . the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

In the *Swann* decision the Court said:

> The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the *Court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions.* (emphasis added) 402 U.S. 1 at 7.

Again we think it important here to emphasize the fact that the District Court in the Scotland Neck case did not make any such finding. Furthermore the Court of Appeals majority found "there is nothing in the record to suggest that the greater percentage of white students in Scotland Neck is a product of residential segregation resulting in part from state action", 442 F. 2d 575 at 582. (App. 1115).

The Court in the *Swann* case approved the order of the District Court requiring busing of students to achieve a dismantling result as action within the sound discretion of the District Court. It is most important here, we think, to point out that that approval was reached on the basis of a District Court Finding of Fact that the Charlotte residential patterns had resulted in part from state-imposed segregation.

On page 28 the Court made this important and entirely clear statement, "absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."

The Court said:

> The District Judge went on to acknowledge that variation from that norm may be unavoidable. This contains

> intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach, would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. 402 U.S. 1 at 23-24.

As we view the *Swann* case it held plainly that the constitution does not require the same ratios in all areas of a district and the constitution does not require assignments out of a residential area in the absence of a distortion of residential patterns caused by state-imposed segregation. As we understand it, the principal point in the *Swann* case is that the constitutional powers of assignment out of residential areas cannot be supported by a mere desire for mixing; it can only be supported by the necessity to dismantle some remaining part of a segregated structure.

Since residential patterns in Scotland Neck were not caused in any respect by state-imposed segregation, no vestige of the segregated structure would remain in the Scotland Neck District.

II.

THE JURISDICTIONAL PREREQUISITE FOR THE ASSIGNMENT OF PUPILS TO A SCHOOL BECAUSE OF RACE IS THE FINDING OF FACT THAT THERE IS A REMAINING VESTIGE OF SEGREGATION IN THE SITUATION

At the very outset of the consideration of the merits of the issue in this case we are faced with a confusing paradox.

The wrong to be remedied was school segregation based only on race.

So there is the appearance of correcting one wrong by the imposition of another wrong.

About this situation the Court said this in *Swann* under its subheading "(3) *Remedial Altering of Attendance Zones.*" "As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a Court. Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." 402 U.S. at 27-28 (1971).

So, we look to see what, in the Scotland Neck case is a remaining vestige of law imposed segregation which must be corrected.

III.

THE ONLY VESTIGE OF SEGREGATION TO BE DISMANTLED HERE IS AN ATTITUDE, A RELUCTANCE TO EXERCISE FREEDOM OF CHOICE; AND BOTH WHITE FLIGHT AND BLACK FLIGHT MUST BE DETERRED IN ORDER TO CORRECT THIS ATTITUDE

Before the statute in this case was enacted there was visible a remaining vestige of law imposed segregation in the Scotland Neck District. With a residential black student population of about 299 only 40 had chosen to go to the Scotland Neck school. (App. 732). Further, a large number of white students living beyond the borders of Scotland Neck had seen fit not to attend the rural school near to them, but had chosen to attend the Scotland Neck school.

To correct that situation temporarily would be simple, by assigning all students resident in Scotland Neck to the Scotland Neck School and to control the transfers of nonresident white students seeking to enter the Scotland Neck School.

Whether that would be acceptable as a proposed dis-

mantling would seem to necessitate inquiry as to the root cause of the situation to be corrected. That raises the question why Freedom of Choice had failed to work in that area.

To discuss that question with clarity it is necessary to take a long, hard and realistic look at the situation in order to try to find what remnant or root of segregation is the focal point for the dismantling procedure.

We look closely at the controlling case, *Green v. School Board of New Kent County,* 391 U.S. 430 (1968). What was the root cause of the situation which gave the Court such concern there? It was a mental attitude.

In New Kent County as in Scotland Neck, it had been made plain that Black students were not going to exercise their freedom of choice to go to a heavily predominant white school. It is just as plain that white students were not going to exercise their freedom of choice to go to a heavily predominant black school. So, Freedom of Choice failed to work effectively because of the mental attitude of people, the black and white students and their parents, because of their reluctance to exercise that freedom.

We have not found that this Court has ever undertaken to make any statement as to precisely what was the feeling concerning that reluctance.

Neither the District Court nor the Court of Appeals nor the petitioners in this case have undertaken to analyze the *causes* of that mental attitude, the causes of that reluctance to exercise Freedom of Choice.

However, the *Green* case approached the problem in a footnote *(Green v. School Board of New Kent County,* 391 U.S. 430 at 440 N. 5). That footnote indicated the nature and some possible causes of that reluctance.

We do not undertake, and we are not qualified to under-

take, a thorough analysis of mental attitudes. However some significant conclusions seem to be clear.

We submit that it is demonstrated by the record in this case and by the opinion in the *Green* case that both the Black students and the White students, and their parents, hold the following firm mental apprehensions or fears, whether justified or not:

That a small minority group of students, Black or White, would face isolation, hostility, danger of physical injury and an education not fashioned properly for that small minority group.

It is certain, we submit, that each of those fears or thoughts has been created or intensified by the law imposed segregation of the past.

To be realistic, we submit that those mental conditions or fears constitute a plank or a rafter or a root of segregation structure which the *Green* case and this case seek to dismantle.

An attitude cannot be changed by mandate or by compulsion to action. Either provokes resistance. A change of attitude can come only from experience and/or observation.

So, the courts in the *Green* case and its companion cases have gone to the extreme length of assigning children to schools because of their race in order that experience and observation may correct the mental attitude, may eliminate the reluctance to exercise Freedom of Choice.

The dissolving of the fears we have mentioned can be accomplished only by experience and/or observation. The students of each race must learn that whites and blacks can associate in schools with profit, that they can achieve mutual respect and dignity and a desire to cooperate in securing quality education.

We submit that "any interim corrective measure" directed toward resolving those fears or prejudices, must be directed to the children and parents of both races. The "reluctance" which we have mentioned is as objectionable in the mind of the white child as it is in the mind of a black child. To attempt to correct it in the black mind without giving any consideration to correction in the white mind will certainly cause the corrective measure to fail of its purpose.

We submit that in any realistic appraisal of the chances for success of a proposed corrective measure, consideration must be given the potential result of such corrective measure on white or black flight from the schools.

The "flight" from the public schools for a substantial number of white or black students to avoid the impact of a proposed corrective measure, will augment rather than diminish the racial distrust which constitutes the "remaining vestige of law imposed segregation" in the Scotland Neck area.

The massive flight of white students from a school is certainly going to cause an increase of racial fears, distrust and animosities. That will surely threaten the achievement of the desired dismantling and impair the quality of the education.

A consideration to deter threatened white or black flights is a good consideration and not an evil consideration. If there is a realistic threat of any such "flight" it cannot be ignored.

In the District Court it was not ignored. It was the basis for the erroneous condemnation of the statute by that District Court. We submit, as the Court of Appeals found, that that basis was entirely unsound. That was the crucial error made by the District Court.

In the opinion of the majority of the judges on the

Court of Appeals the prospective "white flight" was not ignored. It was a cause for great concern to that majority.

In the dissenting opinions in the Court of Appeals the white flight was ignored.

In the briefs for both the petitioners the negative effects of white flight on dismantling and on quality education have been ignored.

Each petitioner takes completely inconsistent positions.

In both briefs the petitioners applaud the dissenting opinions of the Court of Appeals Justices who condemned the statute because it would keep approximately 400 white students in their home school in Scotland Neck (a 50% white ratio) rather than distributing approximately 300 of those white Scotland Neck students to "black schools" to raise the ratio in those schools about 3 points. They spent scores of pages on that argument. They base their whole case upon the prospective, corrective effect on the district, of assigning 300 white students to schools beyond the borders of Scotland Neck. Their total argument is based on the value to the unitary movement which will come from the addition of those 300 white students to the Halifax County School District.

With complete inconsistency they shut their eyes to the loss from the Halifax County District schools of 1,102 white students who fled from the district schools following the preliminary injunction and later the permanent injunction, a loss which increased the black ratio in the district to 85.8%. (Table I, App. E).

IV.

THE STATUTE DOES NOT DETER DISMANTLING. IN FACT IT HAS UNIQUE MERIT AS A TOOL FOR DISMANTLING, NAMELY OVERCOM-

ING THE MENTAL ATTITUDE WHICH OBSTRUCTED FREEDOM OF CHOICE

To support the validity of the Statute it is only necessary to find that the statute does not go beyond the limits of the sound discretion vested in the initial administrative policy making body, here the Legislature.

We do not contend that the dismantling of segregation was a primary motive behind the Legislative action.

In actual fact the primary motive of the Legislature was better schools, to be secured by more money, local supervision and support, and the deterring of the movement of students to private schools.

But the Legislature, necessarily reached a conclusion that the Statute did meet the requirements announced in the *Green* case. So, we take a close look at the statute in the light of the *Green* case.

Possibly the best way to prove the acceptability of the statute is to compare its dismantling features with those of the District Court plan put into effect after operation under the statute was enjoined.

First we set forth what we submit are the major points of dismantling found in the Scotland Neck Statute.

a. The statute follows the lines of a natural residential pattern. The basic natural preference of a child is to attend a school in the neighborhood in which he lives. An unnatural reluctance to attend such local school can be overcome more quickly and more permanently if the effort is made in the home neighborhood. The attack should be concentrated locally.

b. A nearly even division of students between blacks and whites avoids any possible contention that such a

division embraces any assertion of superiority of either race. Such even division would lessen the fears of bodily harm by a small minority and would overcome the inevitable reaction of a small minority toward aggressive and violent self-assertion.

c. The school in Scotland Neck will receive unusually strong neighborhood support. That will help to assure the success of the dismantling process.

d. The Scotland Neck District offers the opportunity of a helpful demonstration of the achievement of peace and educational progress by cooperation in school work between blacks and whites.

e. The Scotland Neck District tends to deter the movement of students to private schools.

f. The Scotland Neck District has an aspect of permanence.

We compare the District Court Plan in the light of features stated above.

V.

THE PLAN ADOPTED BY THE DISTRICT COURT DOES NOT MEET THE REQUIREMENT OF REASONABLENESS AND REALISM

a. The District Court Plan departs radically from a natural residential pattern. Of the 400 white school children resident in Scotland Neck the District Plan and the petitioners would assign approximately 250 students outside of the Scotland Neck limits (if those students did not move out of the public school system). (App. 681, 682). They would be so assigned solely on the basis of race. That would be a cause of continued discontent, dissention and rebellion as long as it lasts.

b. The District Court Plan of assignment out of a residential neighborhood against the wishes of the assigned students would be a continual emphasis of race. The objective of increasing to 22% the ratio of white students in outlying districts invites the charge that it is an assertion of racial superiority. It adds fuel to the fire of racial antagonism.

c. The District Court Plan would not assure neighborhood support of schools. It would alienate that support.

d. The District Court Plan would offer no opportunity for any school in the district to demonstrate the achievement of peace and better education by cooperative effort. There would be only heavily dominant black schools. There would be no proof of satisfactory cooperation between blacks and whites in a district school. There would be no real working together on even terms.

e. The District Court Plan would not deter the movement of students to private schools. In fact it would accelerate and stimulate that movement, as experience has shown (See Tables I & II, App. E). Such a continued movement of white students to private schools will greatly intensify racial and class animosities.

f. The District Court Plan has no aspect of permanence. Rather, it has an open and plain aspect of a temporary unrealistic expedient.

This Court said on April 20, 1971, in *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 at 37.

"The measure of any desegregation plan is its effectiveness."

When so measured, the District Court plan is proved ineffective. We point to the actual experience.

We compare below the enrollment record in the Halifax County School District for the school year immediately preceding the August 26, 1969 District Court temporary injunction with the enrollment of 1971. The figures for 1968-69 are taken from the Overman deposition, (App. 219-220), and from plaintiff's Exhibit #13 (App. 727-745). The figures for October 1971 are taken from the Overman affidavit, (App. 1153) (App. D). Both sets of figures reflect actual enrollment.

ENROLLMENT IN HALIFAX COUNTY SCHOOL DISTRICT 1968-69 AND OCTOBER 1971

	White	Black	% Black
1968-69	2357	8196	77.7
1971-72	1255	7585	85.8

In that total Halifax County District the Black ratio rose 8.1 points in 26 months.

From that District, 1102 (46.7%) of the white pupils had disappeared.

From that District, 611 (7%) of the black pupils had disappeared.

The Petitioners center their attack on a geographical area in the Southeastern portion of Halifax County which they call District I. They refer to it as the [redacted]-Brawley attendance zone. In that smaller area, chosen for discussion by the Petitioners, the flight experience of both white and black pupils was much worse than in the district as a whole. That is shown by the actual enrollment figures taken from the Overman deposition and the Overman affidavit of October 1971. Those figures are as follows:

ENROLLMENT IN THE SO-CALLED DISTRICT I OF THE HALIFAX COUNTY SCHOOL DISTRICT 1968-69 and OCTOBER 1971

	White	Black	% Black
1968-69	786	2516	76.0
1971-72	322	2261	87.5

In that Southeastern section (so-called District I) of the Halifax County School District the black ratio had risen during the 26 months experience period by 11.5 points.

From that sub-district, 464 (59%) of the white pupils had disappeared.

From that sub-district, 255 (10.1%) of the black pupils had disappeared.

The white pupil disappearance in that sub-district was 45.7% greater than in the remaining Districts II and III, namely a disappearance of 59% rather than 40.5%.

In that sub-district the black pupil disappearance was 60.3% greater than in the remaining Districts II and III, namely a disappearance of 10.1% rather than 6.3%.

A substantial disappearance of the white pupils was predictable. Such disappearance had been predicted as was shown by the record in this case. In fact the District Court anticipated substantial disappearance but erroneously observed that it could not give it consideration as a factor in a desegregation plan.

It was also predictable that the disappearance in the immediate Scotland Neck area would be more severe than in the remaining Halifax County District.

Experience has now added a factor which was not predicted by any witness, that is, the substantial disappearance

of black pupils. That could be a very significant matter. The fact that the black pupil disappearance was 60.3% greater in the Scotland Neck area than in the remaining Halifax County School District (consisting of Districts II and III) plainly points to the influence of the injunction on the black pupil disappearance. It must be true that the black pupil disappearance was caused in large part by a loss of confidence in the prospective quality of the education under the court plan.

It seems clear that a prospective flight of both white and black students is an element which must be considered in fashioning a plan for the correction of the reluctance of black and white pupils to exercise their freedom of choice.

VI.

REPLY TO SOME SPECIAL POINTS IN THE BRIEFS OF PETITIONERS

The foregoing brief is the primary reply to briefs of the petitioners. There are only a few special features to which we reply additionally.

Petitioners deal with integration rather than desegregation, with mixing rather than with dismantling an identified remaining vestige of law imposed segregation. They seek forced assignments by race, in order to remove "substantial disproportion" in the racial composition of the several schools in the district. They would make substantial racial disproportion between schools a condition which must be corrected, regardless of the natural racial composition of the neighborhoods in which the schools are located. We understand the *Swann* decision to condemn such an objective.

We note in each brief for petitioners the strong emphasis on what they call the pre-*Brown* Scotland Neck-Brawley Unity. They argue that where law imposed segregation was

made easier by such unity (they call it disregard of lines) that unity should be continued in the desegregating process. It would seem that precisely the contrary should be sought. The best way to uproot the racial reluctance fostered by the old Scotland Neck-Brawley "unity" is to dismantle that unity "root and branch". The Scotland Neck Statute severs all unity with Brawley by adopting the natural residential lines of the city limits. The Scotland Neck black and white students would be held in the Scotland Neck school. The petitioners' plan would force about half of the Scotland Neck black pupils and nearly all of the Scotland Neck white pupils into the Brawley school. Such perpetuation of the Scotland Neck-Brawley "unity operation" would increase rather than abate racial discord.

Petitioners speak of the "hole in the doughnut", even though there is such a situation wherever there are city schools and county schools. Surely the division between municipal and rural schools is not of itself discriminatory.

Petitioners' briefs refer again and again to the Scotland Neck plan as creative of a "dominant white majority". That is a misuse of that word *dominant*. As a matter of fact the realistic prediction for the Scotland Neck plan is a practically even division between blacks and whites. However, even if there should be a 57% white resultant proportion that would be a majority but surely not a dominant one. To dominate means to rule, to govern. Domination could and probably would be achieved by a 80% racial ratio. Surely 57% school pupils could not be called dominant.

Again and again the briefs of petitioners speak of the creation of the Scotland Neck District as a *secession*. We do not see fit to answer that mischievous charge. We do deplore it as not being conducive to an atmosphere which must be sought if the turmoil in our schools is to be resolved.

We note the argument made by petitioners that the statute invites whites to move into Scotland Neck. We had under-

stood the *Swann* decision to refuse to consider speculation as to future residential patterns. However, it is clear that it would be the strong objective of the defendant Scotland Neck City Board of Education and of the community of Scotland Neck to achieve such a high quality school that it would attract new residents to the city, blacks and whites, and not only from the County of Halifax but from abroad. It is possible, even probable, that the Scotland Neck school operation would attract as many new black residents as new white residents.

CONCLUSION

The most significant feature of this case is this: starting with the promotion of the Statute and running through its enactment, through the December 1969 announced plan of the Scotland Neck City Board of Education, through portions of the opinion of the District Court, and through the opinion of the majority of the Court of Appeals, there is a current of concern about the quality of education in the public schools. A definite part of that concern for quality education is anxiety about the prospective flight of white students to the private schools and the consequent impairment of public education.

Those concerns carry with them the hopeful thought that the public and the courts are now recognizing that the dismantling of remaining vestiges of law imposed segregation is a matter in which whites as well as blacks have a vital interest and that both will be considered in the planning of schools for all of our children.

The next most important feature of this case is the envisioned potential of achieving federal, state and local cooperation in the process of providing interim corrective measures for the dismantling of the racial reluctance to exercise freedom of choice.

Without that hope and without that potential of coopera-

tion the path ahead would look very difficult. For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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